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DATO' AZIZI YOM AHMAD & ANOR

v.

SEACERA TILES BHD & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
MARY LIM J
[CIVIL SUIT NO: 22NCC-1169-2011]
4 APRIL 2013

C ***COMPANY LAW:*** *Shares - Legal and equitable ownership - Whether former shareholder had locus standi to maintain action - Whether sale of share agreement completed pending consideration - Whether sale of share agreement null and void - Whether defendant bore burden to prove actual notice of contravention - Companies Act 1965, s. 132C(3)*

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The first defendant, a public listed company, owned 500,000 ordinary shares of RM1 each in the second defendant. Pursuant to a Share Sale Agreement ('SSA') dated 1 November 2010, the first defendant agreed to sell the entire shareholding to the third and fourth defendants for RM6 million. The consideration was to

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be paid in 30 monthly instalments. The fourth, fifth and sixth defendants were the children of the third defendant. Together with the third defendant, they were the current directors of the second defendant. The first plaintiff was a former director of the

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first defendant who retired on 29 June 2007 and was also a registered shareholder of 1,000 shares in the first defendant. He further claimed to be a beneficial shareholder of 1,989,239 shares in the first defendant which was held by the second plaintiff. The second plaintiff was the former marketing manager of the first

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defendant and was also a registered shareholder of 8,000 shares in the first defendant. Both the plaintiffs were now with a company known as Newlake Development Sdn Bhd ('Newlake'). The dispute arose due to a piece of land in Kayu Ara which the second defendant had purchased on 27 April 2007. The

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development on the Kayu Ara land was abandoned sometime in 2004 and the board of directors of the first defendant decided to dispose the land. The first defendant received a few offers including one from Newlake. However, the first defendant opted to sell the land to the third defendant who was the current

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director of the second defendant. The plaintiffs challenged the sale and claimed that the SSA contravened s. 132C of the Companies Act 1965 ('Act') and Chapter 10 of the Main Market Listing Requirements ('MMLR') as the transaction exceeded 25% of the

percentage ratio of the defendants' property. The plaintiffs sought declaratory orders to the effect that the SSA was null and void and an injunction to restrain the defendants from implementing the SSA and if the SSA was completed, then appropriate orders be made to order the return of the shares and undo what was carried out pursuant to the SSA. The issues that arose, *inter alia,* were: (i) whether the plaintiff had the *locus standi* to maintain the action; (ii) whether the SSA transaction was completed pending the payments of consideration; (iii) whether there was substantial disposal of the first defendant's property; (iv) the burden of proof of actual notice of contravention required pursuant to s. 132C(3) of the Companies Act 1965.

Held (dismissing plaintiff's claim with costs):

(1) Article 11(a) and (b) of the first defendant's articles of association did not recognise the holding of its shares on trust for anyone including the first plaintiff. It did not recognise beneficial interest and only recognised absolute ownership of shares. The first plaintiff could not use his current shareholding to examine and complain against an earlier transaction. A former shareholder can no longer enforce the agreement as the said agreement would no longer have any effect on the said former shareholder. If the first plaintiff was allowed to question the material transaction, a commercial chaos may result. The cause of action belonged to the first defendant and the plaintiffs had no *locus standi* to seek orders pursuant to s. 132C of the Act. (paras 20, 31)

(2) The court rejected the plaintiff's contention that as long as the purchase consideration had not been fully paid up, the SSA was not completed. When interpreting private contracts, the court looked at the factual matrix which formed the background of the transaction. Since the fourth to the sixth defendants were appointed to the board of directors of the second defendant on 16 April 2010, the transaction was deemed completed on the said date. (paras 28, 29 & 30)

(3) Only the first defendant could answer the question whether the SSA was a transaction with a percentage ratio of 25% or more under the Main Market Listing Requirements which required a shareholder's approval. The other defendants were not in control of the first defendant and the SSA made no

provision for such requirement, therefore there was no reason to infer or impute such knowledge. In the upshot, there had been no contravention of s. 132C on both the facts and the law including the provision of the Listing Requirements. (paras 87 & 103)

(4) Section 132C(3) of the Act preserved the validity of the transaction in favour of any person who have dealt with the company for valuable consideration and who had no actual notice of the contravention. Section 132C(3) of the Act recognised that third parties who dealt with the company would not have intimate knowledge of the business of the company that they had transacted with. The provision required actual notice of the contravention on the part of the clients. (paras 89-91)

(5) There was no evidence of actual knowledge of the contravention. The party who relied on s. 132C(3) of the Act bore the burden to prove knowledge of contravention that the sale transaction required the approval of an EGM pursuant to s. 132C(3) of the Act. However, since the plaintiffs had failed to prove that there was contravention, the defendants were not required to prove the defence under s. 132C(3) of the Act. It would undermine the whole object of s. 132C(3) of the Act which was to protect third parties who had given valuable consideration and who had no actual knowledge of the contravention. The SSA was conducted at arm's length. There was no evidence to say that the defendant were involved in the business of the first defendant at the material time. (paras 94, 97, 103 & 104)

Case(s) referred to:

Bank of Tokyo Ltd v. Mohd Zaini Arshad & Anor [1991] 2 CLJ 989; [1991] 2 CLJ (Rep) 341 HC ***(refd)***

Bursa Malaysia Securities Bhd v. Gan Boon Aun [2009] 5 CLJ 698 CA ***(refd)***

Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak [2010] 7 CLJ 808 CA ***(refd)***

Edwards v. Halliwell [1950] 2 All ER 1064 ***(refd)***

Foss v. Harbottle [1843] 2 Hare 461 ***(refd)***

Glamour Green Sdn Bhd v. Ambank Bhd & Ors & Another Appeal [2007] 3 CLJ 413 CA ***(refd)***

Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 WLR 896 ***(refd)***

Lloyd v. Bank [1868] 3 Ch App 488 ***(refd)***
LS Investment Pte Ltd v. Majlis Ugama Islam Singapore [1998] 3 SLR 197 ***(refd)***
M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 14 SC ***(dist)***
Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd [1997] AC 749 ***(refd)***
Pioneer Haven Sdn Bhd v. Ho Hup Construction Company Bhd & Anor and Other Appeals [2012] 5 CLJ 169 CA ***(refd)***
Rahaz Sdn Bhd v. Faston Group Ltd & Ors [2010] 3 CLJ 181 CA ***(refd)***
Reeves v. Pope [1914] 2 KB 284 ***(refd)***
Shahidan Shafie v. Atlan Holdings Bhd & Anor & Other Appeals [2005] 3 CLJ 793 CA ***(refd)***
Sirius International Co v. FAI General Insurance Ltd and others [2004] 1 WLR 3251 ***(refd)***
Ting Chong Maa v. Chor Sek Choon [1989] 1 CLJ 813; [1989] 2 CLJ (Rep) 572 HC ***(refd)***
Yeng Hing Enterprise Sdn Bhd v. Liow Su Fah [1979] 1 LNS 130 FC ***(refd)***

Legislation referred to:
Capital Markets and Services Act 2007, s. 11(4)
Companies Act 1965, ss. 16(6), 132C(1A), (3), 158(4)

For the plaintiff - Steven How (Jasmine Shin with him); M/s Kumar Jaspal Quah & Aishah
For the 1st defendant - Gopi Seshadari; M/s Gopi Seshadari
For 2nd-6th defendants - Sean Yeow (JS Hoi with him); M/s Lee Hishammuddin Allen & Gledhill

Reported by Sandra Gabriel

JUDGMENT

Mary Lim J:

Background Facts

[1] The first defendant is a public listed company. It owned 500,000 ordinary shares of RM1 each in the second defendant. Pursuant to a share sale agreement dated 1 November 2010, the first defendant agreed to sell this entire shareholding to the third and fourth defendants for RM6 million (SSA). This consideration was to be paid in 30 monthly instalments. The fourth, fifth and sixth defendants are the children of the third defendant. Together with the third defendant, they are the current directors of the second defendant.

[2] The first plaintiff once sat on the first defendant's board of directors. He retired on 29 June 2007. Between 1996 to his retirement, he held various positions such as executive vice chairman, executive chairman, non-independent non-executive chairman and director. He is a registered shareholder of 1000 shares in the first defendant. He purchased these shares on 16 May 2011. He claims to be also a beneficial shareholder of 1,989,239 shares in the first defendant. These shares are supposedly held by the second plaintiff.

[3] The second plaintiff has been a registered shareholder of 8,000 shares in the first defendant since 11 September 1999. Like the first plaintiff, the second plaintiff once worked with the first defendant. She was its marketing manager in 1995. She resigned from the first defendant in 2006.

[4] Both the plaintiffs are now with a company known as Newlake Development Sdn Bhd (Newlake). The first plaintiff is its executive director while the second plaintiff is its general manager. Currently, she oversees one of Newlakes' projects known as "10 Boulevard". The first plaintiff is actually the boss of the second plaintiff.

[5] At the heart of the problem between the parties is really a piece of land in Kayu Ara which the second defendant had purchased on 27 April 2007 from a company known as Antara Vista Sdn Bhd (AVSB). AVSB commenced development on the Kayu Ara land but abandoned it sometime in 2004 when the project was only 7% completed. The first defendant initially wanted to develop this land but changed its mind. The board of directors of the first defendant explored alternatives including disposing the Kayu Ara land.

[6] The first defendant received a few offers including one from the first plaintiff's Newlake and another from a company known as Dimensi Developers Sdn Bhd (Dimensi). Both offers were rejected. In September 2010, the third and fourth defendants offered and this time, their offer was accepted. The first defendant opted to sell to the third defendant and through the mode mentioned at the outset here. The plaintiffs are unhappy with that purchase and have raised several challenges.

The Plaintiffs' Claims

[7] The plaintiffs claimed that the SSA is void as it contravenes s. 132C of the Companies Act 1965 and Chapter 10 of the Main Market Listing Requirements. Those provisions require the consent or approval of the shareholders procured at an EGM. Since no EGM had been convened, the SSA is void. This is evident from para. 32 of the statement of claim.

[8] The plaintiffs further claimed that the defendants' actions were *mala fide* because the first four defendants were aware of the requirements of the Companies Act 1965 and the Main Market Listing Requirements as they had legal advice at the relevant time. The fourth and fifth defendants are said to be directors of a company known as Ong Chong Realty Sdn Bhd and as such ought to have known that an EGM was required in order for the SSA to be valid.

[9] The plaintiffs have also alleged that the SSA contained terms which were unjust and prejudicial to the first defendant. Amongst such terms are those on the consideration which is said to be too long and uncertain; that the third and fourth defendants had gained control of the first defendant through the fifth and sixth defendants appointments as directors even before the consideration had been paid in full (only RM600,000 had been paid when they assumed directorship). The fifth and sixth defendants being nominees of the third and fourth defendants. These factors indicate that the defendants knew that if the SSA had been brought before the EGM, it would not have been approved. It was also alleged that the removal of cl. 5.1(b) from the SSA was deliberate. This clause required the defendants to secure EGM approval for the SSA.

[10] The plaintiffs alleged that this SSA allowed the defendants to utilise profits from the land development project to pay for the SSA. But, if the project was unsuccessful, then these defendants would simply walk away with only the deposit being forfeited.

[11] The plaintiffs claimed that despite being aware of the existence of two other higher offers, the first defendant proceeded to conclude the SSA with the third and fourth defendants. The defendants had therefore deliberately concealed the existence of the SSA as they knew that the terms of the SSA were not favourable to the first defendant.

[12] For all these reasons, the plaintiffs sought declaratory orders to the effect that the SSA is null and void; and that an injunction ought to be ordered to restrain the defendants from entering or implementing the SSA. If the SSA had been completed, then appropriate orders ought to be made to order the return of the shares and undo everything that had been carried out under and pursuant to the SSA.

The Defendants' Responses

[13] The defendants disputed all these contentions and their responses can be summarised as follow:

(i) that the plaintiffs do not have requisite *locus standi* to maintain the present complaints;

(ii) even if the plaintiffs have *locus standi*, there has been no substantial disposal of the first defendant's property;

(iii) even if the plaintiffs have *locus standi*, and there has been a substantial disposal of the first defendant's property, the SSA is not *ipso facto* invalidated in view of the operation of s. 132C(3) of the Companies Act 1965; and

(iv) that there has been no violation of s. 132C of the Companies Act 1965.

Findings

[14] At the trial, both the plaintiffs testified while the two sets of defendants represented two different counsel called one witness each. I shall deal with their testimonies later, seeing that their testimonies pertain especially to how s. 132C of the Companies Act 1965 operates and whether it has been contravened in the facts and circumstances of this case.

[15] But, first I propose to deal with the issue of the plaintiffs' *locus standi* first before determining the issue of whether there has been any contravention of s. 132C of the Companies Act 1965.

[16] In the written and oral submissions of all counsel, I note that there have been some comparisons of the provisions of s. 132C prior to its amendments and as it stands. Those submissions are appreciated and have been taken on board by the court. However, I do not propose to explore them seeing that we

should take the law as it stands now. Further, and more important, the provisions are clear and do not require such examination, or any determination.

Locus Standi - General

[17] It is the defendants' arguments that the plaintiffs lack both general *locus standi* and the limited *locus standi* accorded under s. 132C of the Companies Act 1965 to maintain this action. The arguments here were very carefully and clearly articulated by both learned counsel for the two sets of defendants. Mr Gopi Seshadari, learned counsel for the first defendant took the arguments under general *locus standi* whereas Mr Sean Yeow, learned counsel for the second to the sixth defendants argued the limited *locus standi* issue. Both counsel adopted each other's arguments.

[18] I propose to deal with Mr Seshadari's submissions first. These arguments are peculiar to the first plaintiff. It is the defendants' contentions that the first plaintiff lacks the necessary *locus standi* because he was not a registered shareholder at the time the sale transaction took place. The SSA was executed and completed on 1 November 2010 and 16 November 2010 respectively. The first plaintiff only purchased 1,000 shares in the first defendant on 16 May 2011. He filed this suit on 2 December 2011.

[19] In response, Mr Steven How, learned counsel for the plaintiffs submitted that the first plaintiff had the requisite *locus standi* for two reasons. Firstly, the SSA had not been completed but was still at the executory stage. According to him, until the purchase price for the shares was fully settled and the ownership in the shares transferred, it was open to the first plaintiff to bring an action to declare the transaction as void. Secondly, the first plaintiff was relying on his "beneficial interest" *vide* 1,989,239 shares in the first defendant held by CIMB Nominees Tempatan on his behalf as providing him with the necessary *locus standi.*

[20] Dealing with the beneficial interest allegedly found in the shares held by CIMB Nominees Tempatan, this claim cannot stand. Save as provided or required by law, articles. 11(a) and (b) of the first defendant's Articles of Association do not recognise the

A holding of its shares on trust for anyone including the first plaintiff. It does not recognise beneficial interest. It only recognises absolute ownership of shares:

> (a) Except as required by law, the Company must not recognize a person as holding a share upon any trust.
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> (b) The Company is not bound by or compelled in any way to recognize (whether or not it has notice of the interest or rights concerned) any equitable, contingent, future or partial interest in any share or unit of a share or (except as otherwise provided by these regulations or by law) any other
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> C right in respect of a share except an absolute right of ownership in the registered holder.

[21] The Federal Court in *Yeng Hing Enterprise Sdn Bhd v. Liow Su Fah* [1979] 1 LNS 130; [1979] 2 MLJ 240, at p. 242 (MLJ),
D reminded that:

> A company does not take cognizance of trusts except in so far as is provided for in section 163 of the Companies Act 1965 which should be read in conjunction with its articles of association
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> E which usually goes beyond the statutory provision by stating that the company shall not be bound to recognize any equitable interest or any other right in a share except an absolute right in the registered holder ... The *cestui que trust* of shares in a company cannot be held liable either as a shareholder or as a contributory for there is no privity of contract between him and the company.

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[22] The Court of Appeal in *Rahaz Sdn Bhd v. Faston Group Ltd & Ors* [2010] 3 CLJ 181 at pp. 194-195; [2010] 1 MLJ 69 at p. 82 in agreeing with the High Court similarly held that beneficial ownership cannot be taken into account:

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> [19] In making a considered decision on this issue the following provisions applies. A person is a member/shareholder of a company if his name is included in a company's register of members (s. 16(6)). The register of members is *prima facie* evidence of the matters stated therein (s. 158(4)). The
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> H memorandum and articles of association are binding on every member or shareholder of a company (s. 33). No notice of any trust shall be entered on a register of a company (s. 163(4)).
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> [20] On the facts of this case, by Rahaz's own admission in their
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> I statement of claim, they are not a registered shareholder of Merbok, but only a beneficial owner of the 29,250,000 shares registered in the name of the specified nominees ...

> The judge however held that such beneficial ownership cannot be taken into account. We agree. A beneficiary of shares, registered in the name of another as trustee, had no rights in such company. This conclusion is fortified by article 6 of the Merbok's memorandum and articles which states ...
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> [21] ...
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> [22] If any of the party to the shareholders agreement no longer holds any ordinary shares in Merbok, that shareholder can no longer enforce the agreement as the said agreement would no longer have any effect *vis-à-vis* the said former shareholder.

[23] Here, the first defendant's Articles of Association also provides that a "member" means "any person for the time being holding shares in the company and whose name appears in the register of members ... ". This is consistent with s. 16(6) of the Companies Act 1965 which provides that members of a company are those whose names are entered into the company's register of members.

[24] Since the first defendant's share register only enters the first plaintiff's name from 16 May 2011, and such entry amounts to *prima facie* evidence of his status as a member of the first defendant under s. 158(4) of the Companies Act 1965; the plaintiff lacks the requisite *locus standi* at the material time. The facts and circumstances in *M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 14 are quite different from those presented here. There, the Supreme Court was expressing its views on conclusion of sale in relation to auctions. Hence, the Supreme Court's remarks at p. 18 to the effect that:

> It is pertinent to note that the terms 'sale concluded', 'conclusion of sale' and 'sale completed' as used respectively in the three above-mentioned sections are merely employed to signify that point in time when there has been an acceptance of the bid in accordance with the sale and purchase agreement or sometimes referred to as the conditions of sale. The sale at this juncture has only been concluded in the sense that the goods will no longer be offered for sale to prospective buyer and the successful bidder cannot be permitted to retract his acceptance.

[25] This becomes clearer when one reads the Supreme Court's judgment further along at p. 19:

> So a reference to a sale being concluded at the fall of the auctioneer's hammer could only refer to that stage of the transaction of sale where there is concluded an agreement between the vendor and the highest bidder, the former to sell and the latter to purchase the goods. **Hence, the term 'conclusion' in the context of these sections can only mean conclusion of certain aspect of the sale** when there is an agreement between the parties to sell and buy the property but the proprietary right has yet to be conveyed from the vendor to the purchaser. (emphasis added)

[26] In our present case, cl. 6.1 of the SSA provides for the completion of the SSA:

> The Completion shall take place on the Completion Date subject to the Purchasers' undertaking to pay in full the Purchase Consideration and the Advances to the Vendor within thirty months from the date hereof. In the event the Purchasers fails to provide ...

[27] In cl. 1.1 of the SSA, "completion" is defined to mean "completion of the sale and purchase of the sale shares in the manner provided in this agreement;" and "completion date" is defined to mean "the date the purchaser or its nominee being appointed as new directors of the target company on or before 30 November 2010 subject to the purchaser's undertaking to pay the purchase consideration and advances within 30 months from the date hereof in accordance with the terms of this agreement".

[28] The court must reject the plaintiffs' suggestion that so long as the purchase consideration has not been fully paid up, the SSA is not completed; hence affording the first plaintiff the right of complaint on the SSA. The defendants have argued that this is a literalist's interpretation of the SSA which should not be condoned by the court, especially for commercial transactions. The House of Lords' decision in *Sirius International Co v. FAI General Insurance Ltd and others* [2004] 1 WLR 3251, 3257 was alluded to in support. In that case, the House of Lords had discussed the interpretation of commercial instruments viewing that:

> ... the aim of the inquiry is not to probe the real intention of the parties but to ascertain the contextual meaning the relevant contractual language. The inquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were,

> would have understood the parties to have meant by the use of specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual sense.
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> 19 There has been a shift from literal methods of interpretation towards a more commercial approach. In *Antaios Compania Naviera SA v. Sale Rederierna* AB [1985] AC 191, 201, Lord Diplock, in an opinion concurred in by his fellow Law Lords, observed: "if detailed semantic and syntactical analysis of a word in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.

[29] The House of Lords then referred to two earlier decisions which applied this same rationale in approach; *Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd* [1997] AC 749 and *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896. All these decisions have found favour here in the oft-cited Court of Appeal's decision in *Glamour Green Sdn Bhd v. Ambank Bhd & Ors & Another Appeal* [2007] 3 CLJ 413: that when interpreting private contracts, the courts look to the factual matrix which forms the background transaction; such matrix includes all material that was reasonably available to the parties; any background which is declaratory of the subjective intent of the parties should be disregarded; and that an objective approach should instead be adopted.

[30] In the context of this SSA, I agree with the defendants that the SSA was completed on 16 November 2010. Since the fourth to the sixth defendants were appointed to the board of directors of the second defendant on 16 November 2010, the transaction is deemed to have been completed on that date. The undertaking is further in place rendering the SSA completed according to the contractual intentions of the parties to the SSA. Therefore, by the time the first plaintiff had registered his interest as shareholder of 1,000 shares in the first defendant, the SSA had been long completed.

[31] I also agree with the defendants' submissions that the first plaintiff is really a stranger to the first defendant at the material time. He cannot, using his current shareholding be allowed to examine and complain against an earlier transaction concluded when he was not a shareholder. Just as a former shareholder "can

no longer enforce the agreement as the said agreement would no longer have any effect *vis-à-vis* the said former shareholder"; a current shareholder cannot challenge a deal which has been completed. He may raise his concerns at the appropriate meetings but not in the present manner. See also the Court of Appeal's decision in *Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak* [2010] 7 CLJ 808; [2011] 3 MLJ 636.

[32] If the first plaintiff was allowed in these circumstances capacity to question the material transaction, commercial chaos may result. This is especially so in the case of a public listed company such as the first defendant whose shares are traded in the stock exchange and where the first plaintiff invests only after he has made the necessary inquiries.

[33] In addition, I agree that the plaintiffs' complaints indicate that the loss, if any, is not personal to them. Indeed, if there is a wrong done, the directors ought to have been cited and the right of action is that of the first defendant's and not the plaintiffs. This becomes apparent when the reliefs in the statement of claim are examined. The plaintiffs have sought mainly declaratory and injunctive orders pertaining to the SSA including its unraveling. There is no claim for personal relief. The plaintiffs therefore lack general *locus standi* to maintain the present action.

Locus Standi - Limited

[34] The second aspect of *locus standi* is the limited right afforded under s. 132C of the Companies Act 1965. This section was amended *vide* Companies (Amendment) Act 2007 (Act A1299) and this is how it now reads:

> **Approval of company required for disposal by directors of company's undertaking or property**
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> 132C. (1) Notwithstanding anything in the memorandum or articles of association of the company, the directors shall not carry into effect any arrangement or transaction for:
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> (a) the acquisition of an undertaking or property of a substantial value; or
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> (b) the disposal of a substantial portion of the company's undertaking or property,

unless the arrangement or transaction has been approved by the company in a general meeting.

(1A) For the purpose of subsection (1), in the case of a company where all or any of its shares are listed for quotation on the official list of a Stock Exchange as defined in the Securities Industry Act 1983, the term 'substantial value' or 'substantial portion' shall mean the same value prescribed by the provisions in the listing requirements of the Exchange:

(a) which relates to acquisitions or disposals by a company or its subsidiaries to which such provision applies; and

(b) which would require the approval of shareholders at a general meeting in accordance with the provisions of such listing requirement.

(1B) In the case of any company other than a company to which subsection (1) is applicable, an undertaking or property shall be considered to be of a substantial value and a portion of the company's undertaking or property shall be considered to be a substantial portion if:

(a) its value exceeds twenty-five per centum of the total assets of the company;

(b) the net profits (after deducting all charges except taxation and excluding extraordinary items) attributed to it amounts to more than twenty-five per centum of the total net profit of the company; or

(c) its value exceeds twenty-five per centum of the issued share capital of the company,

whichever is the highest.

(2) The Court may, on an application of any member of the company, restrain the directors from entering into a transaction in contravention of subsection (1).

(3) Where an arrangement or transaction is carried into effect in contravention of subsection (1), the arrangement or transaction shall be void except in favour of any person dealing with the company for valuable consideration and without actual notice of the contravention.

[35] The submissions here were canvassed by Mr Sean Yeow. From the provisions of s. 132C, it is quite apparent that the challenge of the present transaction is not open to just anyone. In relation to this issue, the defendants put much stock on the Court of Appeal's recent decision in *Pioneer Haven Sdn Bhd v. Ho Hup Construction Company Bhd & Anor and Other Appeals* [2012] 5 CLJ 169.

[36] The plaintiffs' response is that the Court of Appeal's decision on this is not binding as it was entirely *obiter*. The Court of Appeal had been invited to determine whether s. 132C applied to the joint development agreement. Having concluded that it did not apply, the issue of *locus standi* became irrelevant. The Court of Appeal ought to have stopped after disposing this issue. Since it did not, what was discussed does not form part of the binding ratio of the decision. This court is therefore not obliged to follow that decision.

[37] I have read the Court of Appeal's decision very carefully. The facts which are similar to present case, can be summarised as follow. Ho Hup Construction Company Ltd (Ho Hup) is a public listed company. Its subsidiary, Bukit Jalil Development Sdn Bhd (Bukit Jalil) owned a 60 acre plot of land which was central in the dispute between the parties. Bukit Jalil entered into a joint development agreement (JDA) with Pioneer Haven to jointly the land. In essence, the venture was expected to see a division of profits between Pioneer Haven as developer and Bukit Jalil as land owner. Ho Hup complained that the JDA was void because the shareholders' approval of Bukit Jalil and Ho Hup had not obtained pursuant to s. 132C of the Companies Act 1965. Ho Hup, *inter alia* alleged that there was no reasonable basis for committing Ho Hup and Bukit Jalil to the JDA; that the commercial viability of the JDA was suspect; that the haste in which the JDA was entered showed the intention on the part of the defendants to pre-empt the outcome of an EGM which was to take place on 17 March 2010.

[38] Although Ho Hup's allegations to support its claims were peculiar to the facts, the court's consideration of s. 132C is nevertheless relevant and binding on this court here.

[39] It is quite clear from the Court of Appeal's judgment that the court was invited to consider whether the respondent had a cause of action in its own right under common law and under statute, specifically s. 132C. At p. 187, the Court of Appeal said:

> ... the answer to the above question would depend on whether Ho Hup is the proper plaintiff.
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> [38] In our view, this question and consequently, the rest of the legal issues raised in these appeals can be answered only if the antecedent facts can lend themselves to the issues at hand. In other words, the issue of *locus standi* will be answered only when certain legal issues are determined.

[40] The court then went into detail on the "fractious history of this appeal" and even greater detail the facts and surrounding circumstances of the case. It took stock of the "dire situation" and the five critical factors that led Ho Hup into the JDA: the fact that it was in PN17 status and needed to regularise its affairs to avoid delisting by Bursa Malaysia; that it needed to repay outstanding loans with CIMB which had rejected its rescheduling proposals and was about to start foreclosure proceedings; that it had filed solvency declarations that it would be able to pay all debts within 12 months from the date of announcement; that it needed to make timely settlements of outstanding liquidated ascertainable damage due to purchasers who had either filed or were in the process of filing petitions to wind up Bukit Jalil, its subsidiary; that there was an urgent need to resolve end financing problems faced by purchasers of some 47 units of shoplots that it had sold.

[41] After examining these circumstances in detail, the Court of Appeal said at p. 192:

> [73] D3's response was that as long as they were directors of Ho Hup, they owed the company a duty to act in its best interest and cannot derogate from their duties, even if they would be removed the next day.
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> [74] As insouciant as this response might appear, we believe that it was as acceptable as it can get, under the circumstances.

[42] And, it was after making these observations and drawing these conclusions that the Court of Appeal then said at para. 75:

> [75] Now once again, the issue of *locus standi* looms large. The question is:

A (i) Whether Ho Hup could bring this suit in its own right against D2 to D8 for breach of fiduciary duties and duty of care under common law and for statutory breach under s. 132C of the act, by virtue of loss to its shareholding in Bukit Jalil; and

B (ii) Whether Ho Hup could bring this suit by way of a derivative action for the benefit of Bukit Jalil against D2 to D8 (as Directors of Ho Hup) and against D3, D9 and D10 as Directors of Bukit Jalil.

C **[43]** It was in answering this first question of *locus standi* that the Court of Appeal said that:

[76] ... these issues are to be considered contextually within the JDA and s. 132C of the Act. In other words, whether the JDA, PA and EU amount to a "disposal", pursuant to
D s. 132C(2) of the Act, and whether D2 to D8 had breached their statutory duties to Ho Hup by committing Bukit Jalil to the JDA, in breach of s. 132C without approval by the shareholders of Bukit Jalil.

[77] In our view, for Ho Hup to succeed in this first locus
E points, it must fall within s. 132C(2), which in itself, is a narrow and limited cause of action.

[44] If one were to examine further the judgment of the Court of Appeal, it will be readily apparent that the Court of Appeal
F was extremely concerned with this issue of *locus standi*, especially under s. 132C. The court took pains to examine the legislative background to this provision and the amendments that had taken place; its impact on the requirements for a challenge under s. 132C; and the object behind this provision. At para. 109, the
G Court of Appeal opined:

[109] Interestingly the present wordings of s. 132C1(a) and (b) came into effect by way of amendment Act A1229/07. Prior to the said amendment, s. 132C(1) read as follows:

H Notwithstanding anything in the company's memorandum or articles, the directors shall not carry into effect any proposal or execute any transaction for:

(a) ...

I (b) the disposal of a substantial portion of the company's undertaking or property

[110] Section 132C as it is presently worded, does not expressly state that the directors or company shall not enter into any arrangement or transaction for the disposal of substantial asset without prior approval by the company at general meeting. Instead it says that the directors shall not carry into effect any such arrangement or transaction without approval of the company at general meeting.

[111] Thus the words "or execute" in the old section have been deleted. Clearly, the intention of the legislation is to restrict the operation of the section to a **situation where the directors are carrying into effect the impugned transaction, as opposed to merely entering into it by executing an agreement**. (emphasis added).

[112] "Carrying into effect" clearly meant the implementation of the JDA. The prohibition does not extend to the entering into or signing of the JDA. By contrast, s. 132C(2) allows an injunction to prevent the "entering into"; this creates a statutory exception, allowing a pre-emptive strike for acts preparatory to "carrying into effect".

[113] ...

[114] One might ask: what is the mischief which s. 132C seeks to avoid? Reading the said section as a whole, it is clear that the mischief which s. 132C was enacted to prohibit, was the party by the company of any of its substantial assets without approval of the shareholders at general meeting. Section 132C makes it incumbent upon the directors and the company to inform the shareholders of any intention to carry into effect any transaction whereby any substantial assets of the company was to be taken out of the company. This duty is indirectly imposed by requiring shareholders' approval before such transaction is carried into effect. The whole objective of s. 132C is designed to protect the interest of the company itself (in this case, Bukit Jalil) and not the interest of a shareholder, such as Ho Hup.

[45] Applying the tests, the Court of Appeal then analysed the terms and the nature of the JDA and found that the JDA together with the power of attorney and the other related documents cum transactions did not amount to a "disposal" within the meaning of s. 132C of the Act. In very clear terms, the court found these documents to be "all valid". That being so, it took the view that Ho Hup was not entitled to sue in its own right pursuant to s. 132C.

[46] Therefore, the Court of Appeal's decision on *locus standi* is not in the least *obiter*. The court always had in sight that it was addressing the question of proper plaintiff in corporate actions. At para. 143, the Court of Appeal said:

> [143] The provision in s. 132C(2) above is unambiguous. As alluded to earlier, it provides relief to restrain the entry into a transaction. In the present appeal, it is not disputed that the JDA has already been executed. In other words, the new or present Board of Ho Hup was faced with a *fait accompli*. Therefore, this subsection, which contemplates pre-emptory relief (to Ho Hup), is inapplicable. In any case, under this s. (132C (2)), the directors that Ho Hup can restrain (if at all) are the directors of Bukit Jalil only, not of Ho Hup itself as the asset in question ie, the land, is the asset of Bukit Jalil. But in this appeals, it appears to us that the complaint by Ho Hup is against the act of its own directors. That, to our mind, does not come within the ambit of s. 132C(2).
>
> [144] The significance of the above legal position must have been lost on Ho Hup.
>
> [145] As Ho Hup has failed to come within the purview of s. 132C(2) its right to commence this suit in its personal right naturally fails.

[47] The Court of Appeal then embarked on a reminder of the rule in *Foss v. Harbottle* [1843] 2 Hare 461 (Vice-Chancellor's Court, England), that the proper plaintiff in a suit for the enforcement of a corporate right, is the company itself:

> [146] It is of course trite that the cornerstone of company law is that a company is a separate legal entity from its shareholders. As such, a shareholder cannot claim any right to any asset of the company, for it has no legal or equitable interest therein. (See *Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors* [2005] 3 CLJ 355).

[48] The Court of Appeal repeatedly reminded itself of its focus on the issue of *locus standi* – see paras. 147 to 150 and 155 to 160. At para. 160, the Court of Appeal said:

> [160] Flowing from this, a member may not sure to enforce a company's rights (See *Prudential Assurance Co Ltd v. Newman Industries Ltd (No. 2)* [1989] 1 All ER 387, for only the company can do so. The rationale is of course, to prevent a multiplicity of suits brought on by members on behalf of the company. In any case, a company is a separate entity from its members and

> because of this a member may not sure to enforce a company's rights. However a member can do so if it is a wrong not to the company but an injury to a member personally. Say for example, if the member's rights are infringed, the member may sue for a personal remedy. An example would be where the company is threatening to breach or actually breaches a contract with a member. It would apply where a member is complaining of a tort committed against him by the company.

[49] Transposing those principles to the facts of this case, the issue is still whether the plaintiffs here have the necessary *locus standi* to initiate this action seeking the particular reliefs which are premised on s. 132C of the Companies Act 1965. The plaintiffs say that they do and that shareholders should be entitled to sue the company for illegal acts done by the company.

[50] The plaintiffs relied on the Court of Appeal's decision in *Shahidan Shafie v. Atlan Holdings Bhd & Anor & Other Appeals* [2005] 3 CLJ 793 which held that " ... an individual shareholder has standing to challenge illegal or *ultra vires* acts was settled beyond doubt by the decision in *Edwards v. Halliwell* [1950] 2 All ER 1064 ... ; and Justice Peh's decision in *Ting Chong Maa v. Chor Sek Choon* [1989] 1 CLJ 813; [1989] 2 CLJ (Rep) 572 @ p. 573." In other words, the plaintiffs are relying on the exceptions to the rule in *Foss v. Harbottle*; that a shareholder of a company can sue in his own name for the benefit of the company where the act complained of is *ultra vires*; or is an illegal act. It is these exceptions that give the plaintiffs today the *locus standi* to initiate this action.

[51] With respect, I disagree. As pointed out, the Court of Appeal was extremely mindful of the proper plaintiff rule in view of *Foss v. Harbottle*. But, being mindful and conscious of the fact that the complaint was one under s. 132C, it was in that context that the Court of Appeal discussed *locus standi* is a limited *locus standi*. It was in this sense that the Court of Appeal found the plaintiff to lack that requisite capacity.

[52] Here, the cause of action belongs to the first defendant and the plaintiffs have no *locus standi* to seek orders pursuant to s. 132C. In any event, looking at the reliefs sought, and on the admission and plea of the plaintiffs and from my earlier findings on

A the terms of the SSA, the transactions have already been completed leaving nothing to be restrained. With such conditions, the orders sought are furthermore, not available to the plaintiffs.

[53] Before dealing with the final issue of s. 132C(3), it is only
B appropriate that the court considers whether there has been a contravention of s. 132C. If there is no contravention, s. 132C(3) does not arise. I shall elaborate on this later.

Whether The SSA Involved A Substantial Disposal Of The First
C *Defendant's Property*

[54] The consideration of this issue requires the examination of s. 132C(1A) of the Companies Act 1965 which reads as follow:

> (1A) For the purpose of subsection (1), in the case of a company
D where all or any of its shares are listed for quotation on the official list of a Stock Exchange as defined in the Securities Industry Act 1983, the term 'substantial value' or 'substantial portion' shall mean the same value prescribed by the provisions in the listing requirements of the Exchange:
>
> E (c) which relates to acquisitions or disposals by a company or its subsidiaries to which such provision applies; and
>
> (d) which would require the approval of shareholders at a general meeting in accordance with the provisions of such listing requirement.
>
> F (1B) In the case of any company other than a company to which subsection (1) is applicable, an undertaking or property shall be considered to be of a substantial value and a portion of the company's undertaking or property shall be considered to be a substantial portion if:
>
> G (d) its value exceeds twenty-five per centum of the total assets of the company;
>
> (e) the net profits (after deducting all charges except taxation and excluding extraordinary items) attributed to it
> H amounts to more than twenty-five per centum of the total net profit of the company; or
>
> (f) its value exceeds twenty-five per centum of the issued share capital of the company,
>
> I whichever is the highest.

[55] This provision must be read together with the listing requirements of Bursa Malaysia, in particular, chapter 10 of the Main Market Listing Requirements.

[56] The plaintiffs say that the SSA was a transaction involving a substantial disposal of the first defendant's property as the percentage ratio of the transaction exceeded 25% as provided under Chapter 10 of the Main Market Listing Requirements Part D. Paragraph 10.07 of Chapter 10 requires shareholders' approval where the percentage ratio of a transaction is 25% or more. The term "percentage ratio" is defined in para. 10.02(g). It means the figures, expressed as a percentage, resulting from each of the following calculations:

(i) the value of the assets which are the subject matter of the transaction, compared with the net assets of the listed valuer;

(ii) net profits (after deducting all charges and taxation and excluding extraordinary items) attributable to the assets which are the subject matter of the transaction, compared with the next assets of the listed valuer;

(iii) the aggregate value of the consideration given or received in relation to the transaction, compared with the net assets of the listed valuer;

(iv) the equity share capital issued by the listed issuer as consideration for an acquisition, compared with the equity share capital previously in issue (excluding treasury shares);

(v) the aggregate value of the consideration given or received in relation to the transaction, compared with the market value of all the ordinary shares of the listed issuer (excluding treasury shares);

(vi) the total assets which are the subject matter of the transaction compared with the total assets of the listed issuer;

(vii) in respect of joint ventures, business transactions or arrangements, the total project costs attributable to the listed issuer compared with the total assets of the listed issuer or in the case where a joint venture corporation is incorporated as a result of the joint venture, the total equity participation of the listed issuer in the joint venture corporation (based on the eventual issued capital of the joint venture corporation) compared with the net assets of the listed issuer. The value of the transaction should include shareholders' loans and guarantees to be given by the listed issuer; or

A (viii) the aggregate original cost of investment of the subject matter of the transaction divided by the net assets of the listed issuer, in the case of a disposal and where the acquisition of the subject matter took place within last 5 years;

B **[57]** The plaintiffs contended that the ratios determined under paras. 10.02(g)(ii) and (v) apply.

[58] According to learned counsel for the first defendant, there are 8 percentage ratios indicators for determining the materiality of C a transaction under Chapter 10 of the Listing Requirements. The defendants contended that the applicable ratios were those found in paras. 10.02(g)(i), (iii), (vi) and (viii).

[59] It would appear that the parties are in agreement on the D non-application of para. 10.02(g)(iv). As for the application of paras. 10.02(g)(ii) and (v), the burden is on the plaintiffs to prove their application.

[60] From the evidence led and the submissions made, the crux of the plaintiffs' concerns the utilisation and application of the E correct ratios and correct figures in relation to the SSA. Upon very careful scrutiny of the evidence and after examining the relevant provisions of the Listing Requirements, I am of the view that this issue must also be answered in the defendants' favour. These are my reasons.

F

[61] I propose to deal with the ratio or calculation as testified by the plaintiffs' witnesses. PW1 testified that the applicable ratio should be that as provided under para. 10.02(g)(ii) whereas the second plaintiff, testifying as PW2, contended that it should be G para. 10.02(g)(v). In relation to para. 10.02(g)(iii), although the plaintiffs appear to agree to its application, the contention is that this has also been breached. I shall deal with this in greater detail later.

H *Ratio Under Para. 10.02(g)(ii)*

[62] In relation to para. 10.02(g)(ii) of the Listing Requirements, the ratio was determined by dividing the net profits attributable to the assets and the net profits of the first defendant. In other words, the formula is:

I

Net profits attributable to assets ÷ Net profits of first defendant

[63] The plaintiffs, through the testimony of the first plaintiff (PW1), claimed that the net profit from the disposal was RM5.7 million. The unaudited net profits as at 30 September 2010 is RM2,125,000. The audited profit as at 31 December 2009 is RM8,176,642. Using either profits of the first defendant and dividing the same with the net profit of RM5.7 million, the plaintiffs claim that the ratio will be well above the 25% threshold: 268% or 69.7% respectively.

[64] In response, Zulkarnain bin Ariffin (DW1), a qualified accountant and a director of the first defendant, testified that not only the incorrect ratios but incorrect figures were used by the plaintiffs. First, the net profits of the first defendant. According to DW1, the net profit of the first defendant was RM8,176,642 and not RM2,125,000, as used by PW1. This is because para. 10.03(4)(a) requires the use of "latest published or announced audited financial statements".

[65] As for the "net profits attributable to the assets", DW1 had explained that by virtue of para. 10.03(2)(b), that was only applicable when the equity interest held by the first defendant was not accounted for using the equity method. DW1 testified that the first defendant held 100% of equity interest in the second defendant. For the purposes of accounting, as a wholly-owned subsidiary of the first defendant, the second defendant's financial statements were consolidated into the first defendant's. The equity method was therefore used. This was agreed to by PW1 (see notes of proceedings, p. 21, QA 62).

[66] PW1 had further agreed in cross-examination that from the first defendant's audited financial statements of 2009 shown to him at the trial, there was no income or dividend contributed from the equity interest that the first defendant held in the second defendant. That being so, learned counsel for the first defendant submitted that a division of this nil factor from the equity interest that was held by the first defendant in the second defendant with the net profits of the first defendant of RM8,176,642, an anomalous result will be produced.

[67] After examining these provisions, I agree with DW1. Paragraph 10.03(4)(a) provides:

> For the purpose of computation of indicators of materiality (including the percentage ratios) in this chapter, the following applies:

A (a) the figures used must, in the case of total assets, net assets, net book value of assets and net profits, be figures shown in the latest published or announced audited financial statements of the listed issuer or audited consolidated financial statements of the listed issuer, if the listed issuer has subsidiaries;

B

[68] In understanding 10.02(g)(ii), regard must be given to para. 10.03(2)(b) which provides:

For the purposes of determining the net profits attributable to the
C assets referred to in para. 10.02(g)(ii) in relation to:

(a) an acquisition of equity ...

(b) a disposal of equity interest of a corporation where, before the disposal of such equity interest was not accounted for using the equity method, the net profits are to be assessed
D by reference to the dividend income derived from such investment based on the last financial year end of such corporation.

[69] From these provisions, it is clear that the first plaintiff
E testifying for the plaintiffs' case in this respect, was indeed erroneous in using the ratio under para. 10.02(g)(ii). PW1 had used figures derived from announcements and unaudited consolidated reports whereas, as required by para. 10.03(4)(a), the defendants had used the audited account for 2009, that being the
F latest audited accounts available at the time of the SSA. The SSA was dated 1 November 2010. Since the first defendant's financial year ends on 31 December of each calendar year, the first defendant was right in using the audited accounts for 2009. In those accounts, the net profit was RM8,176,642 and not
G RM2,125,000, as used by PW1.

[70] I am therefore satisfied that the plaintiffs have not shown how this ratio under para. 10.02(g)(ii) applies while the defendants have shown how it does not.

H *Ratio Under Para. 10.02(g)(v)*

[71] As for para. 10.02(g)(v), the ratio was determined by dividing the aggregate value of the consideration received and the market value of all ordinary shares of the first defendant. It is
I noted that this ratio was relied on and explained by PW2.

[72] According to PW2, the percentage ratio yielded under this calculation was more than 200%. She contended that while the purchase consideration was RM6 million, the aggregate value of the consideration was actually higher. This was because para. 10.02(m) of the Listing Requirements defined "value of the consideration" as "includes any liability to be assumed". A B

[73] Pursuant to cls. 3A.1 and 8.2(a) of the SSA (see pp. 117 and 124 of bundle A), the third and fourth defendants were to assume all liabilities of the second defendant and pay the same to the first defendant on or before the settlement date. PW2 testified that this meant that all monies owing by the second defendant to the first defendant and other third parties prior to the SSA must be included. That assumption would be from 31 December 2009. C

[74] PW2 testified as to various items of liabilities that had to be included but were not included. Once included, the sum would balloon from RM6 million to RM23,656,782 and the defendants' figures and ratios will be seen as incorrect. Amongst the liabilities not included was a sum of RM9,771,782. This sum comprised RM8,320,505 owing to the first defendant and RM1,451,277 owing to third parties (see p. 97 of bundle A – the second defendant's reports and financial statements for the financial year ended 31 December 2009); and a further sum of RM7.885 million representing the settlement of pending claims in the earlier abandoned project on the Kayu Ara land. In addition, the plaintiffs argued that contingent liabilities, which had yet to be quantified since the accounts of the second defendant were only up to 31 December 2009, had also to be taken into account under cl. 8.2(a)(i) of the SSA. D E F

[75] The defendants on the other hand, submitted that even the second plaintiff got it wrong. In the first place, her allegation of a percentage ratio of more than 200% was not borne out when she calculated the ratio using her own alleged total consideration of RM23,656,782. She calculated the market value of all ordinary shares of the first defendant as at 1 November 2010 by taking the weighted average market price of the first defendant's shares for five market days preceding the sale transaction. She then multiplied that value by the total share capital of the first defendant as at 30 September 2010. Instead of a ratio of 200%, the calculation under this ratio yielded 79.2% and not 200%. G H I

[76] In relation to para. 10.02(g)(v), PW1 testified that this provision must be read together with para. 10.03(8) which states:

> The calculation set out in subparagraph 10.02(g)(v) is only applicable in respect of:
>
> (a) transactions involving consideration in the form of listed equity shares; or
>
> (b) transactions where all the other percentage ratios produce anomalous results or are inapplicable.

[77] According to DW1, para. 10.03(8)(a) was not applicable because the consideration was in the form of cash. As for para. 10.03(8)(b), he testified that this ratio was not applicable because the other percentage ratios did not produce anomalous results and that it was not a situation where the other percentage ratios were not applicable.

[78] As for the various liabilities that PW2 claimed had to be included, DW1's answer was that these sums were owed by the second defendant to the first defendant; and not by the third and fourth defendants to the first defendant. The third and fourth defendants only personally guaranteed these sums. The liability was always that of the second defendant's.

[79] As for the contingent liabilities, the third and fourth defendants have undertaken to pay such liabilities that may have existed prior to 1 November 2010 (date of the SSA). As at that date, these liabilities were indeterminable or ascertainable. Further, DW1 testified that these liabilities were not included because according to the Malaysian Accounting Standards Board, a "contingent liability" was defined as "a possible obligation that arises from past events and whose existence will be confirmed only by occurrence or non-occurrence of one or more uncertain future events not wholly within the control of the entity and that an entity should not recognise a contingent liability". DW1 added that these contingent liabilities, if and when they became payable, "would not have any effect on the first defendant at all. These contingent liabilities are liabilities of the second defendant to third parties and not to the first defendant".

[80] DW1 also testified that the SSA was announced on Bursa Malaysia on 1 November 2010 as the first defendant believed that the percentage of the sale transaction exceeded 5% of the net

assets of the first defendant. This announcement was required under Chapter 10 para. 10.06(1) of Bursa Malaysia's Listing Requirements. Pursuant to Chapter 10 para. 10.06(2), Bursa Malaysia was informed by letter dated 1 November 2010 of the percentage ratio applicable. Following the first defendant's notification, Bursa Malaysia sought additional information from the first defendant. Upon provision of such information, a further announcement was made on 4 November 2010. When the SSA was completed, another announcement was made on 16 November 2010.

[81] Although no officer from Bursa was called to clarify, I do not find this as detrimental. In fact, having heard the testimony of DW1 which is supported by the documents and the provisions in the Listing Requirements, I am inclined to believe and accept that these explanations must have been echoed at Bursa Malaysia for after its inquiries were attended to, it did not seek any further explanation. It is reasonable to say that given these circumstances, Bursa Malaysia must have been satisfied.

[82] Pursuant to s. 11(4) of the Capital Markets and Services Act 2007 (Act 671), Bursa has the onerous duty "to take appropriate action as may be provided for under its rules for the purposes of monitoring or securing compliance with such rules". It " ... issues monitors and enforces rules and requirement pertaining to the conduct of listed companies ... In essence at the heart of the enforcement proceedings of Bursa, as a regulator of a capital market, timeliness and accuracy are crucial factors". This was highlighted by Bursa's counsel and recognised by the Court of Appeal in *Bursa Malaysia Securities Bhd v. Gan Boon Aun* [2009] 5 CLJ 698 at p 725; [2009] 4 MLJ 695 at p. 719.

[83] From the above, it is patently clear that the evidence of DW1 ought to be preferred over those of PW1 and PW2. Apart from the fact that DW1 was the person involved in the transactions, he is a professionally trained, an accountant by profession familiar with the Listing Requirements.

[84] Upon my total appreciation of all the oral testimonies given, I must say that I am impressed with the evidence of DW1. He was knowledgeable and familiar with the operations and somewhat complex workings of the Listing Requirements. He informed the

court that he had prior experience in such compliance matters having worked previously with two other public listed companies. He was not self-serving or defensive; and came across as a witness who was responsible and always conscious of the obligations of the parties under the Listing Requirements. He was able to respond quite comprehensively and coherently the various allegations of the plaintiffs.

[85] DW1's analysis of the plaintiffs' contentions was systematic and meticulous and his explanations made much sense and logical reading from the relevant provisions of the Listing Requirements. Indeed, he had given evidence quite ably and professionally in this regard. He was clear, unflustered by cross-examination and gave credibly and cogent evidence, calmly. In short, I found him an honest witness. The court accepts the explanations of DW1 including the detailed explanations as to the operation and inter-play of the various paragraphs of the Listing Requirements; why some applied and why some did not.

[86] In sharp contrast are the testimonies of PW1 and PW2 which were not only easily and credibly countered by DW1, but were not in any supported or borne out by the documentary evidence, including the relevant provisions of the Listing Requirements. PW2's response of "feeling right" about her contentions are not good enough in a court of law.

[87] The upshot of this is that there has been no contravention of s. 132C, on both the facts and the law, including the provisions of the Listing Requirements.

Operation Of S. 132C(3)

[88] In the event I am mistaken in my conclusions, and for the sake of completeness, there is still another aspect under s. 132C which I had alluded to earlier. This aspect was canvassed by Mr Yeow and it is his submissions on s. 132C(3).

[89] Taking learned counsel's arguments one step further, he submitted that even assuming the plaintiffs have *locus standi* and that there has been a substantial disposal of the first defendant's property, he argued that the SSA is not *ipso facto* invalidated. Reading s. 132C(3) very carefully, he makes a strong and persuasive case for his clients that the provision actually preserves

the validity of the transaction in favour of any person, such as his clients, who have dealt with the company for valuable consideration and who have had no actual notice of the contravention.

[90] Learned counsel contended that s. 132C(3) recognises that third parties who deal with the company "would usually not have intimate knowledge of the business of the company they are transacting with, let alone whether a particular transaction is a disposal of a substantial portion of the company's property (or an acquisition by the company of a property of a substantial value) within the meaning of s. 132C". Such persons should not be penalised for the company's contravention as the intention of the provision is to statutorily preserve the integrity of their transactions.

[91] Insofar as the element of "valuable consideration' is concerned, he argued that the presence of this cannot be denied. As for notice, there is no room for the implication suggestion that his clients having ought to have known. The provision clearly requires proof of actual notice of the contravention on the part of his clients.

[92] The plaintiffs submitted on the other hand, that the third and fourth defendants actually knew that the sale transaction required the approval of an EGM, as provided under s. 132C. Given that the third defendant is an experienced businessman with extensive experience in purchasing properties (he is said to be involved in more than ten projects and has purchased properties for up to RM60 million), it was suggested that "it would be improbable that he does not know the requirement of s. 132C of the CA".

[93] Mr How, learned counsel for the plaintiff also alluded to the existence of an earlier suit filed by the first plaintiff against the same defendants except the fifth defendant. He submitted that this was proof of the third defendant's knowledge of contravention of s. 132C. That suit was withdrawn before the plaintiffs filed the present suit.

[94] Let me deal with a side issue that arose in relation to s. 132C(3) and, that is, the question of who bears the burden of proof. Mr How referred to the language in the previous

A s. 132C(3) as providing the answer; and that the burden is on the defendants. The short answer to this is - who is relying on s. 132C(3)? The answer is obvious - it is upon the defendants and this can be gleaned from para. 15 of the defence of the second to the sixth defendants where it is pleaded:

B

> 15. Paragraphs 32 and 33 of the Statement of Claim are denied. The third and 4th Defendants dealt with the first Defendant and entered into the SSA for valuable consideration and do not have any notice of any alleged contravention of any purported contravention of section 132C Companies Act
C 1965 by the first Defendant. These are internal matters of the first Defendant which the third and 4th Defendants are not bound to inquire into and does not affect the validity of the SSA.

D **[95]** Be that as it may, I find the burden discharged by the defendants. Section 132C(3) in no uncertain terms statutorily preserves the transaction in question where certain conditions are met. Those conditions being the requirement of valuable consideration and the want of actual notice of the contravention
E on the part of the person who has dealt with the offending or contravening company.

[96] The third defendant has testified under oath that he had no knowledge of the need for a shareholders' approval/EGM as he viewed this as an "internal matter of the first defendant and it was
F for the first defendant to decide if they needed to obtain shareholders' approval for the transaction". He then told the court that he was "informed by the first defendant that shareholders' approval was not required and had no reason to believe otherwise".

G

[97] The plaintiffs have invited the court to reject the defendants' claim of no knowledge on the basis that it was "improbable that he does not know the requirement of s. 132C of the Companies Act 1965". Although the third defendant had
H admitted to knowing of the provisions of s. 132C, that it regulates both listed and private companies; that an EGM would normally required for the disposal of the company's assets, that is still a long, long way from saying that the third defendant or any of the defendants had actual notice of the contravention. That is
I assuming there is even a contravention by the first defendant to

start with. Since the plaintiffs have failed to prove that there is a contravention, the defendants are actually not required to prove this defence under s. 132C(3).

[98] In any case the requirement of "actual notice" means precisely that - that the third defendant " ... is actually aware" - see *LS Investment Pte Ltd v. Majlis Ugama Islam Singapore* [1998] 3 SLR 197, 209. This becomes even clearer when one appreciates that the principle of notice is generally discussed and considered in the context or together with the concepts of constructive or imputed notice (see *Bank of Tokyo Ltd v. Mohd Zaini Arshad & Anor* [1991] 2 CLJ 989; [1991] 2 CLJ (Rep) 341).

[99] The plaintiffs are in fact imputing notice on the part of the defendants as opposed to proving actual notice. In *Bank of Tokyo Ltd v. Mohd Zaini Arshad & Anor*, Justice Lim Beng Choon had referred to the decision of *Lloyd v. Bank* [1868] 3 Ch App 488 when discussing the three types of notice: actual, constructive and imputed notice in the context of determining who among two competing claimants would have the better equity over certain property; the assignee under a deed of assignment or a purchaser under a sale and purchase agreement for the purchase of the same property.

[100] After concluding that the assignment in question was an absolute assignment, His Lordship nevertheless decided to consider this question of who had better equity "should I be wrong in arriving at the aforesaid conclusion" said at p. 348 ... that a subsequent purchaser is affected by notice of an equity when there is:

(i) actual notice: where the equity is within his own knowledge - see *Lloyd v. Bank* [1868] 3 Ch App 488 where it was held that a purchaser could not safely disregard information from any source if it was of such a nature that a reasonable man or man of business would act upon the information;

(ii) constructive notice: where the equity would have come to his own knowledge if proper enquiries had been made and;

(iii) imputed notice: where his agent as such in the course of the transaction had actual or constructive notice of the equity - see *Reeves v. Pope* [1914] 2 KB 284.

[101] Now, in *Lloyd v. Bank*, Lord Cairns LC was very careful in making sure that he was not laying down "rules which might, in the abstract, be useful and wholesome rules for the conduct of

business in matters of this kind. If such abstract rules are to be laid down, they must be laid down by the Legislature of the country." Further, with respect, the Lord Chancellor was not discussing or defining 'actual notice' in that case. Although the terms "constructive" or "imputed" notice were not used, it is quite apparent that His Lordship was in fact discussing about such concepts. Hence, his reluctance to go against the "principles upon which this court has always proceeded" if he were to hold:

> ... that under no circumstances could a trustee, without express notice from the incumbrancer, be fixed with knowledge of an incumbrance upon the fund of which he is the trustee so as to give the incumbrancer the same benefit which he would have had if he had himself given notice to the trustee. It must depend on the facts of the case; but I am quite prepared to say that I think the Court would expect to find that those who alleged that the trustee had knowledge of the incumbrance had made it out, not by evidence of casual conversations, much less by proof that the mind of the trustee has in some way been brought to an intelligent apprehension of the nature of the incumbrance which has come upon the property, so that a reasonable man, or an ordinary man of business, could act upon the information and would regulate his conduct by it in the execution of the trust. If it can be shown that in any way the trustee has got knowledge of that kind - knowledge which would operate upon the mind of any rational man, or man of business, and make him act with reference to the knowledge he has so acquired - then I think the end is attained, and that there has been fixed upon the conscience of the trustee, and through that upon the trust fund, a security against its being parted with in any way that would be inconsistent with the incumbrance which has been created.

[102] Therefore, when Justice Lim described 'actual notice' as 'within his own knowledge', it means nothing less than that the third defendant knows of the contravention.

[103] On the facts of this case, there is no evidence that there is present this actual knowledge of the contravention; assuming there is one in the first place. While I agree with learned counsel for the defendants that the SSA or the transaction was conducted at arm's length and that there is no evidence whatsoever to say that the defendants/purchasers were in anyway involved in the business of the first defendant at the material time; that the question of whether the SSA was a transaction with a percentage ratio of 25% or more under the Main Market Listing Requirements which required shareholders' approval was one peculiar with the first

defendant and that only the first defendant could answer; that these other defendants were not in control of the first defendant; and that the SSA made no provision for such requirement; there is actually no reason to infer or impute such knowledge.

[104] In fact, it would be highly improper and irregular to do so as it would run counter to the clear provisions of s. 132C(3). Furthermore, it may even undermine the whole object of s. 132C(3) which is to protect third parties who have given valuable consideration and who had no actual knowledge of the contravention.

[105] The defendants have invited the court to examine the motive behind the plaintiffs' present action. While I have considered them, I do not find it necessary to make any finding on them.

[106] Finally, the court notes the conscientious care and quality of advocacy displayed here, especially in the handling of the matters under the Main Listing Requirements. That standard is high and commendable and has greatly assisted the court.

Conclusion

[107] Given all these reasons, the court agrees with the defendants that the plaintiffs have failed to prove their case on a balance of probabilities. The plaintiffs do not have any *locus standi* to bring the present action, especially for the reliefs set out in the statement of claim. Even if they did, their claim must fail as the provisions of s. 132C of the Companies Act 1965 have not been contravened.

[108] Accordingly, the plaintiffs' case must be dismissed with costs of RM70,000 to the first defendant and RM35,000 to the second to the sixth defendants. These sums were agreed between the parties and I agree that these amounts are appropriate given the complexity of the issues; the extent of research and getting-up done; the time taken for preparation and the duration the trial; the number of witnesses called; and the seniority of counsel involved.